No. 3994

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. ALLEN RISPIN,
Plaintiff in Error,
vs.
THE MIDNIGHT OIL COMPANY
(a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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This is an action by The Midnight Oil Company against H. Allen Rispin upon a contract of guaranty to recover the sum of $10,000.00 as liquidated damages for an alleged breach of the principal obligation. The principal obligation in substance provides that the Associated Oil Company will, barring unavoidable delays, commence and drill a well upon certain land belonging to The Midnight Oil Company by a specified time and in a particular manner and test out the known productive oil sands of the

Lance Creek field in the State of Wyoming (Tr. p. 21). The guaranty provides that upon the failure of the Associated Oil Company so to commence and drill the well, Rispin, upon notice, will pay The Midnight Oil Company $10,000.00 as liquidated damages for any such breach of the principal obligation (Tr. p. 4).

The complaint alleges the failure of the Associated Oil Company to drill the well, a notice to the defendant of such failure and a demand for the payment of the above named sum as liquidated damages, and that it would be impracticable and extremely difficult to fix actual damages suffered by plaintiff because of the failure to drill such well.

There is no allegation that the Associated Oil Company was not prevented by unavoidable delays, nor any allegation that the plaintiff has suffered any damage by reason of said alleged failure.

The general demurrer interposed by defendant was overruled and thereafter he filed his amended answer (Tr. p. 8).

The amended answer alleges in substance that the plaintiff herein succeeded to all the right, title and interest of the Hopewell Oil Company as lessor under a lease and operating contract with the Associated Oil Company; that under this operating lease, the Hopewell Oil Company agreed to immediately deliver possession of the land described in plaintiff's complaint to the Associated Oil Company for operation under said lease; that by the terms of the

assignment of said operating lease from the Hopewell Oil Company to the plaintiff, the latter agreed to perform all the terms, conditions, agreements and covenants of the said operating lease so far as it related to said land referred to in plaintiff's complaint (Tr. p. 8, pp. 26-28).

The amended answer then alleges that the Associated Oil Company was at all times ready, able and willing to commence the drilling and completion of the well on said premises in the manner provided in the principal obligation on or before the 15th day of June, 1919, but that plaintiff herein was unable and failed, neglected and refused to deliver possession of the said premises to said Associated Oil Company on or before said date; that the Associated Oil Company at said time attempted to secure possession of said premises but was prevented from so doing by threats of physical violence to its servants and by forcible opposition by third parties claiming the premises adversely to plaintiff; that except for plaintiff's failure to deliver possession of the premises, the Associated Oil Company would have drilled and completed a well on the premises commencing on or before June 15, 1919, in accordance with the provisions of the principal obligation, and would have thereafter prosecuted the drilling of the well and tested out the known productive oil sands of the Lance Creek field (Tr. pp. 9-10).

The allegation then follows that the Associated Oil Company was barred by unavoidable delays on

its part from drilling or commencing to drill a well on said premises on or before the 15th of June, 1919 (Tr. p. 10).

It is further alleged by defendant that during the time the Associated Oil Company was excluded from said premises, other wells were drilled on the geologic structure underlying said premises and that such wells have tested out the known productive oil sands of the Lance Creek field and have demonstrated that oil in commercial quantities does not exist under said premises. It is then alleged that plaintiff has sustained no damage of any kind by reason of anything set forth in its complaint. The amended answer specifically denies that it would be impracticable or extremely difficult to fix actual damages which may have been suffered by plaintiff and alleges that at all times it would be and is an extremely simple and easy matter exactly to compute any damage which may have occurred or did occur to plaintiff (Tr. pp. 10-11).

The general demurrer of plaintiff to defendant's amended answer was sustained (Tr. p. 31). Defendant declining further to amend his answer, the Court below directed that judgment be entered for plaintiff as prayed (Tr. pp. 31-32).

Plaintiff in error makes the following assignments of error (Tr. pp. 36, 37):

The Court erred:

1. *In overruling the defendant's demurrer to plaintiff's complaint and in holding that said*

complaint states facts sufficient to constitute a cause of action against defendant.

2. *In sustaining plaintiff's demurrer to defendant's amended answer and in holding that said amended answer does not state facts sufficient to constitute a defense to said action.*

3. *In directing judgment to be entered in favor of plaintiff and against defendant in accordance with the prayer of plaintiff's complaint.*

I.

THE COURT ERRED IN SUSTAINING THE PLAINTIFF'S DEMURRER TO DEFENDANT'S AMENDED ANSWER AND IN HOLDING THAT THE AMENDED ANSWER DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A DEFENSE TO SAID ACTION.

Because we believe the most obvious error on the part of the Court below consisted in sustaining the demurrer of plaintiff to the defendant's amended answer, we will consider that question first:

We consider that in this ruling the Court was clearly in error because:

1. The demurrer admits that performance by the principal obligor (Associated Oil Company) was prevented by the default of the obligee (The Midnight Oil Company) and hence the defendant Rispin, as guarantor, is discharged.

2. The sum to be paid is for a penalty in which case plaintiff cannot recover without allegation and proof of actual damage, and the demurrer admits defendant's allegation that plaintiff suffered no damage whatsoever.

3. It being admitted that no damage whatever has been sustained by reason of the alleged default of the principal obligor, plaintiff could not recover even liquidated damages.

The contract sued upon is clearly a contract of guaranty. It meets every test.

Defendant did not agree to drill a well for plaintiff, but merely guaranteed that, under certain conditions, and barring unavoidable delays, that the Associated Oil Company would do so. The Associated Oil Company was therefore the principal obligor and the defendant herein the guarantor. If, therefore, the Associated Oil Company was for any reason discharged of its obligation to perform, the defendant herein, as guarantor, was likewise relieved of liability.

By the terms of the principal obligation, the Associated Oil Company was obligated to drill a well *only if not barred* by unavoidable delays. It is not alleged in the complaint that the Associated Oil Company *was not barred* by unavoidable delays. On the other hand, it is expressly admitted by the demurrer to the amended answer, not only that the Associated Oil Company *was barred by unavoidable*

delays, but that that Company was ready, able and willing to commence and drill such well on said premises as it had agreed and that the plaintiff herein itself prevented performance by being unable and having failed, neglected and refused *to deliver possession of the premises;* the demurrer likewise admits defendant's allegation that but for plaintiff's failure so to deliver possession of the premises, the Associated Oil Company would have performed on its part,

1. Plaintiff failed to deliver possession of the premises, thus committed the first breach and can not insist upon performance.

Let us now examine the rights, duties and obligations of the plaintiff herein with reference to the drilling of such well.

By the contract annexed to defendant's amended answer (Tr. p. 19), the Hopewell Oil Company and the Associated Oil Company agreed that the Associated Oil Company should drill a well for oil and gas on certain lands, including the land mentioned in plaintiff's complaint herein. Here is the first provision of said contract:

> "1. The said party of the first part (the Hopewell Oil Company) shall immediately deliver possession of said lands to the party of the second part (Associated Oil Company) for operation under the terms of said lease and under the terms of this agreement."

The lease referred to is the lease from the Western States Oil & Land Company to the Hopewell Oil Company, found in the transcript (p. 12).

The Hopewell Oil Company assigned (see Tr. p. 26) to the plaintiff herein all of its right, title and interest in the lease from the Western States Oil & Land Company and the operating agreement with the Associated Oil Company, so far as they relate to the land mentioned in the complaint herein. The concluding part of this assignment provides:

> "To Have and to Hold by the said The Midnight Oil Company, its successors and assigns, subject, however, to all the terms, conditions, agreements, covenants and royalties expressed in said lease, which said terms, conditions, agreements, covenants and royalties, The Midnight Oil Company agrees to keep, perform and pay so far as it relates to the above described land assigned to it and subject to the said operating contract as to all of the terms, conditions, agreements and covenants therein contained."

The amended answer alleges that this assignment to the plaintiff is the same assignment referred to in the instrument sued upon herein and set out in Paragraph IV of plaintiff's complaint (Tr. p. 9).

We therefore have this situation. The plaintiff herein expressly covenanted to put the Associated Oil Company into possession of the premises. The amended answer alleges that plaintiff failed, neglected and refused to put the Associated Oil Company into possession and that but for such failure, the Associated Oil Company would have performed on its part. Obviously, the Associated Oil Company could not drill a well upon this land without having possession thereof, and we therefore have the re-

markable situation of an obligee suing the guarantor for the failure of the obligor to perform, which failure was in turn occasioned by the default of the obligee.

Under these facts, and under well settled authorities, this failure on the part of the plaintiff discharged the Associated Oil Company of all liability under the operating agreement, and the defendant herein being but a secondary obligor, was likewise discharged.

> "Where the lease contains express covenants to put the lessee in possession, a subsequent trespass by a third person before the lessee has entered * * * will constitute a breach of the contract for which the lessor is liable * * * If possession is withheld by the lessor * * * the lessee may at his option repudiate the contract or bring an action against the lessor for a breach of his agreement."
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> 24 *Cyc.*, 1051;
>
> *Brandt v. Phillippi,* 82 Cal. 640;
>
> *Dengler v. Michellsen,* 76 Cal. 125;
>
> *Rice v. Whitmore,* 74 Cal. 619;
>
> *Hay v. Cumberland,* 25 Barb. 594;
>
> *King v. Reynolds,* 67 Ala. 229; 42 Am. Rep. 107.

In *Brandt v. Phillippi,* supra, it is said:

> "It is the duty of the lessor to put his lessee in possession and until he does so, he cannot recover rent."

In *Dengler v. Michellsen,* supra, an action for rent, it appeared that the landlord could not put the

defendants in possession at the beginning of the lease and the defendants thereafter refused to have anything to do with the premises. In affirming judgment for defendants, the Court said:

> "The failure of plaintiffs to put defendants or their assignor in possession of the leased premises justified the defendants in abandoning the premises."

—

That the amended answer in alleging that plaintiff prevented performance by the Associated Oil Company, stated a complete defense to this action, is likewise established by the case of

> *U. S. v. United Engineering Co.,* 234 U. S. 236; 58 L. Ed. 1294,

and the authorities there cited.

In that case the company sued for some $6,000.00 deducted by the government as liquidated damages for 240 days delay under a contract for the construction of a drydock. It appeared that the government had delayed performance by the company and the Court said in giving judgment for the plaintiff:

> "We think the better rule is that when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment, the other party must not prevent the performance of the contract within the stipulated time * * * Certainly the other party ought not to be

> permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated time. To do this would permit it to recover damages for delay caused by its own conduct. * * * If a man agrees to do something by a particular time, or in default, to pay a sum of money as liquidated damages, the other party must not do anything to prevent him from doing the thing contracted for within the specified time."

In the case of *National Surety Co. v. Long,* 125 Fed. 887, the Court said:

> "The plaintiff failed to keep his covenants before the Surety Company had in any way failed to comply with those which it had made. On this account, he cannot enforce the fulfillment of the covenants of the defendant. He who commits the first substantial breach of a contract, can not maintain an action against the other contracting party for a subsequent failure on his part to perform."

See, also,

Loudenbach v. Tennessee Phosphate Co., 121 Fed. 298.

It thus appearing that the Associated Oil Company was clearly released, it necessarily follows that the defendant Rispin, as guarantor, was likewise released.

> "If there is no obligation on the principal, there is none of the guarantor."
>
> 12 *Ruling Case Law,* 1053;
>
> *Kilbride v. Moss,* 113 Cal. 432.

2. The sum to be paid is for a penalty and plaintiff cannot recover without allegation and proof of actual damage.

Plaintiff's complaint does not allege that plaintiff has suffered any damage, and defendant's amended answer expressly alleges that plaintiff did not.

It therefore becomes necessary to classify the guaranty as providing for liquidated damages or for a penalty. If the guaranty is to be construed as providing for a penalty, it is of course *elementary* that actual damage must be alleged and proved, and that recovery is limited to compensation therefor.

The instrument itself purports to provide for liquidated damages. This, however, is not determinative.

> *In re Sherwoods,* 210 Fed. 760;
> *Bethlehem Steel Co.,* 205 U. S. 105.

Neither is it determinative that the instrument recites that actual damages would be difficult to ascertain.

> *Pacific Factor Company v. Adler,* 90 Cal. 110;
> *Dyer Bros. v. Central Iron Works,* 182 Cal. 588.

The question is a proper one for this Court to inquire into under the proper rules of law applicable to the construction of such contracts. Not only that, but the Court should incline to construe the provision rather as for a penalty than for liquidated damages, because by so doing, substantial jus-

tice can be more nearly accomplished.

17 *Corp. Juris,* 938, and cases cited;

Johnson v. Southwestern Surety Co., 206 Fed. 486;

Ill. Surety Co. v. U. S., 229 Fed. 527.

The distinction between a penalty and a provision for liquidated damages is as follows:

> "A penalty is in effect a security for performance while a provision for liquidated damages is for a sum to be paid in lieu of performance."
>
> 17 *Corpus Juris,* 933.

Obviously, the guaranty executed by this defendant gave the Associated Oil Company no choice of anything in lieu of performance. Notwithstanding the guaranty executed by defendant, the Associated Oil Company would still default in performance at its peril. As a provision for liquidated damages, this defendant's contract of guaranty very obviously fails to meet the test of something in lieu of performance, because, in the event of default by the principal obligor, defendant's liability, instead of being in lieu of performance, would be in addition to it.

Another test frequently applied to provisions of this character, to ascertain whether they are for liquidated damages or for a penalty, is the test of whether the provision is collateral to another agreement. It has been frequently held that where the agreement is made for the attainment of another

object or purpose, to which the stipulated sum is entirely collateral, such stipulated sum will be treated as a penalty.

O'Keefe v. Dyer, 20 Mont. 477; 152 Pac. 196;
Potomac Power Co. v. Burchell, 109 Va. 676; 64 S. E. 982;
Gougar v. Buffalo Specialty Co., (Colo.) 141 Pacific 515;
Johnson v. Southwestern Surety Co., 206 Fed. 486;
17 *Corpus Juris,* 946.

There would seem to be no doubt but that the contract of guaranty executed by this defendant was entirely collateral and subordinate to the main object desired by the obligee, namely, the object of getting its well drilled at the time and in the manner specified. The obligation of this defendant to pay the stipulated sum of ten thousand dollars was not only collateral to this main purpose, but was actually dependent upon it. The plaintiff would hardly suggest, we suppose, that it had entered into a wagering contract, or made a bet with the defendant as to whether the Associated Oil Company would perform its contract or not, and unless plaintiff takes this precise position, defendant's contract of guaranty exactly means a compliance with this second test of what constitutes a penalty.

There is still another test which is frequently applied to contracts for the purpose of determining whether they applied for stipulated damages or for

penalty. It was stated in the case of

People v. Central Pacific R. R. Co., 76 Cal. 37,

as follows:

> "If a gross sum is stipulated to be paid for any failure to fulfill an agreement consisting of several parts, and requiring several things to be done or omitted, it is a penalty. The statement is true * * * even where the actual damages are uncertain, if it appears that the damages resulting from one of the breaches may be great and from another small, since the inequality is logically certain."

The same rule was stated in

Wilkins v. Colley, 164 Pa. 35; 30 Atl. 286,

as follows:

> "Where there are a number of covenants and the sum named would be payable for a breach of any one of them, even the least, it is a penalty."

and the same rule was expressed in

Watts, Executor v. Sheppard, 2 Alabama 425,

as follows:

> "Where the articles covenant for the performance of several things and stipulate for the payment of a sum in gross, in the event of a breach, the sum expressed must be considered as a penalty. *And if the parties would stipulate the damage, in such a case, they would express the sum to be paid upon each distinct breach."*

See, also,

Escondido Oil Co. v. Glaser, 144 Cal. 495,

where the sum to be paid by way of liquidated dam-

ages was "for the breach of the contract *or any part thereof*", and

Tudor v. Beath (Ind.), 131 N. E. 848,

in which the authorities are collected and reviewed. See, also, the rule as discussed by the learned United States Circuit Court of Appeals for the Second Circuit in the case of

Ill. Surety Co. v. U. S., 229 Fed. 527.

The rule was not applicable to the facts of that particular case, because the bond under discussion ran in favor of the United States government, but the Court stated as follows:

> "If this bond had been given to an individual instead of to the government, it might be important that it contained no less than sixteen conditions of varying importance; for courts have held that where an agreement contains several distinct and independent covenants, upon which there may be several breaches, and one sum is stated to be paid upon the breach of performance, that sum is to be regarded as a penalty and not liquidated damages (Lampman vs. Cochran, 16 N. Y. 275; Hoagland vs. Segur, 38 N. Y. Law 230; Chase v. Allen, 13 Gray (79 Mass.) 42; Keck v. Bieber, 148 Pa. 645; 24 Atl. 170; 33 Am. St. Rep. 846. That doctrine was applied by the Supreme Court in Bignall v. Gould, 119 U. S. 495; 7 Supreme Court 295; 30 Lawyers Ed. 491."

Turning now to the agreement executed by this defendant, for the purpose of ascertaining its character by this third test, let us see exactly what defendant guaranteed in the sum of ten thousand dollars that the Associated Oil Company would do:

(a) That the Associated Oil Company would commence to drill on or before June 15, 1919; (b) That they would use a rig capable of reaching a depth of 4000 feet; (c) That they would prosecute the well continuously thereafter, barring unavoidable delays; (d) That they would complete the well barring unavoidable delays; (e) That they would reach the depth of the known productive oil sands.

Every one of the above acts agreed to be performed by the Associated Oil Company were to be performed in the manner specified and indeed a careful perusal of the documents in question will indicate that there were numerous other acts also to be done on the part of the Associated Oil Company for the performance of which defendant was bound in this sum.

But, lest there should be any question but what defendant was bound in the full amount of the penal sum specified for the performance of *each* of these acts, we refer once more to the language of the guaranty herein sued upon, which is as follows:

> "Should the Associated Oil Company or its assigns for any reason fail to drill and complete said well *in manner and form as above specified,* then and in that event, and because the damage occasioned thereby to the Midnight Oil Company would be difficult if not impossible to ascertain * * * the undersigned, H. A. Rispin, agrees to pay to the said Midnight Oil Company the sum of ten thousand dollars * * ."

In other words, under the language of the instrument herein sued upon, this defendant would be lia-

ble to plaintiff in the identical amount if the Associated Oil Company was one day or one month late in commencing to drill, as if the Associated Oil Company had failed to drill at all. This defendant would be liable for ten thousand dollars if the Associated Oil Company had performed its contract with a rig capable only of reaching a depth of 3000 feet, as if the Associated Oil Company had failed completely to do anything which it was obligated to do. Under the language of this agreement, defendant was liable equally for trivial defaults which would result in no damage whatsoever to plaintiff as well as for defaults which would deprive plaintiff of the entire fruits of its contract. Under all of the authorities, in such a case as this, and for the purpose of accomplishing substantial justice, the provision should be construed as for a penalty and not for liquidated damages.

The provision herein sued upon, therefore, fails to meet the three most important tests of the provision for liquidated damages, and meets exactly the corresponding tests of what constitutes a penalty. In such case, plaintiff in error submits that the general rule of law applicable to provisions for a penalty applies to this case, and that in the absence of allegations and proof of damage, no recovery can be had.

3. **Provision even for liquidated damages will not be enforced where no damages whatever have been sustained.**

As we have heretofore seen the complaint does not allege any damage suffered by plaintiff. The amend-

ed answer alleges that plaintiff has sustained no damage. If such were the fact and that issue of fact is directly presented by the amended answer, and, of course, is admitted by plaintiff's general demurrer, it is immaterial whether the provision is for liquidated damages or for a penalty. In neither case will a provision be enforced if no damage has been sustained.

This question was considered and squarely decided by this Honorable Court in

N. W. Fixture Co. v. Kilbourne, 128 Fed. 256.

This Court was there considering an agreement containing the following provision:

> "It is agreed that in the event either party hereto fails to keep his agreement, the party thus in default shall pay to the other party the sum of $10,000.00 as liquidated damages for the breach thereof."

The appellant in that case filed a claim for $10,000.00 against the bankrupt's estate claiming the sum was due as liquidated damages provided in the agreement. The Court below rejected the claim and this Court, in affirming judgment, said:

> "It is clear that no damages were recoverable by the appellant for the breach—if breach there were—of the contract. Conceding the rule to be that, in order to recover a sum as liquidated damages, it is unnecessary to prove actual damage, it is also true that *no provision in a contract for the payment of a fixed sum as damages, whether stipulated for as a penalty or as liquidated damages, will be enforced in a case*

> *where the Court can see that no damages have been sustained.* It is the general rule that where the sum in the contract to be paid on the breach thereof is evidently wholly disproportionate to the damages actually sustained, or where it is shown that no actual damage has been sustained by the breach, the courts will deem the parties to have intended to stipulate for a mere penalty to secure performance." (Italics supplied.)

Citing:

> 19 *Am. & Eng. Enc. Law* (Sec. Ed.) 410;
> *Gay v. Camp,* 65 Fed. 794;
> *Wilcus v. King,* 87 Ill. 107.

The above portion of this Court's opinion was substantially quoted and followed in the case of

> *The Columbia,* 197 Fed. 661.

Regardless, therefore, of whether the provision is a penalty or for liquidated damages, the issue of fact being directly raised that no damages whatever have been sustained by the plaintiff, the Court below committed error in disregarding this issue by sustaining the demurrer to the amended answer and holding that it does not state facts sufficient to constitute a defense to the action.

II.

THE COURT ERRED IN OVERRULING THE DEMURRER TO THE COMPLAINT.

As we have pointed out heretofore, the complaint nowhere alleges that the Associated Oil Company

was not *prevented by unavoidable delays* in commencing to drill and thereafter to complete the well provided for in the contract. As we have heretofore seen by the very terms of the contract sued upon, that company was NOT obligated to commence the drilling and complete said well *if barred by unavoidable delays.* The covenant on the part of the defendant is specific in its guaranty that the Associated Oil Company will drill such well, *barring unavoidable delays.* If there was no obligation on the part of the Associated Oil Company, the defendant could, of course, not have guaranteed it. The complaint should, therefore, allege facts showing that the Associated Oil Company was obligated to perform on its part.

> "A complaint in an action on a guaranty must generally set out the terms of a guaranty and the principal obligation."
>
> 12 *Ruling Case Law,* 1095.

The complaint in this case does not measure up to the requirements of this rule and is deficient in all of the particulars which we have enumerated hereinabove.

III.

THE COURT ERRED IN DIRECTING JUDGMENT TO BE ENTERED IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT IN ACCORDANCE WITH THE PRAYER OF PLAINTIFF'S COMPLAINT.

The Court below assumed as a matter of law that this was a proper case for liquidated damages and

proceeded to give judgment without hearing any evidence either as to whether it was impracticable or extremely difficult to fix actual damages, or whether plaintiff had suffered no damage as alleged by defendant.

The Court below in its opinion said (Tr. p. 32):

> "Here the subject of the contract is such that it can readily be seen that it would be practically impossible to ascertain with any degree of certainty the actual damage suffered by the breach and in such an instance they were entitled to stipulate for its liquidation. In such a case the intervention of a jury is wholly unnecessary."

We believe and we now urge that this action on the part of the Court was error for the following reasons:

(1) It is alleged in the complaint that it would be, was and is impracticable and extremely difficult to fix the actual damages suffered by plaintiff.

This is a necessary allegation to plaintiff's cause of action and if denied by defendant, of course, requires proof. The allegation, furthermore, is specifically denied, and thus is presented a question of fact that the Court below obviously disregarded as shown in the above portion of its opinion.

In *Dyer v. Central Iron Works,* 182 Cal. 588, the Court directly decided that the question whether it would be impracticable or extremely difficult to fix actual damages *is a question of fact and requires both pleading and proof.*

The Court obviously considered that fact to be properly pleaded, but entirely dispensed with the necessity of hearing proof. In this the Court erred, because an issue of fact is disregarded and left undecided.

(2) It is clear under the authorities heretofore cited that the sum to be paid under the contract is a penalty and not as for liquidated damages. Before the Court could enter a proper judgment, there would therefore have to be evidence of actual damage, or at least an allegation of actual damage.

Ill. Surety Co. v. U. S., 229 Fed. 527; 8 Cal. Juris. 844.

(3) Even if it be assumed the provision is for liquidated damages, under the authorities heretofore cited, particularly *N. W. Fixture Co. v. Kilbourne,* 128 Fed. 256, if no damage whatever has been sustained by plaintiff, the Court below was without authority to give judgment for plaintiff. The defendant particularly alleges that no damage whatever has been sustained by plaintiff. The demurrer to the answer, of course, expressly admits this allegation to be true. With the record in this condition, how could the Court below properly proceed to enter judgment for plaintiff for $10,000.00?

For these reasons, the Court erred in entering judgment as prayed for without first disposing of the issues, first, as to whether it was a proper case for liquidated damages and, second, whether any damage whatsoever had been sustained by plaintiff.

CONCLUSION.

To summarize our contentions in this case, the judgment of the trial Court should be reversed because:

1. (a) The complaint does not sufficiently allege an obligation on the part of the principal obligor which defendant could have guaranteed;

(b) It appears on the face of the complaint itself that the sum to be paid is for a penalty and requires both allegation and proof of actual damage, both of which are lacking.

2. (a) The plaintiff itself, under the allegations of the amended answer, prevented performance by the principal obligor and thereby discharged both the principal and secondary obligors;

(b) The principal obligor was excused from performance under its agreement if barred by unavoidable delays; the contract sued upon only guarantees performance of the principal obligor if not barred by unavoidable delays; the defendant alleges that the principal obligor was barred by unavoidable delays;

(c) The defendant alleges that no damage whatever has been sustained by the plaintiff;

3. The defendant denies that it would be impracticable or extremely difficult to fix actual damages and alleges that damage would be easy of ascertainment.

All of the above issues of fact were disregarded and left undecided by the trial Court in entering judgment.

For these reasons, the judgment of the trial Court should be reversed.

Respectfully submitted,

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Dated, San Francisco,
May 11, 1923.